

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

77-1208

To be argued by
PETER D. SUDLER

United States Court of Appeals FOR THE SECOND CIRCUIT

Docket No. 77-1208

UNITED STATES OF AMERICA,

Appellee,

—v.—

SANDY CHECK,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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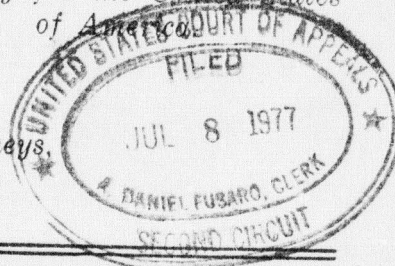


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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1208

UNITED STATES OF AMERICA,

Appellee,

—v.—

SANDY CHECK,

Defendant-Appellant.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Sandy Check appeals from a judgment of conviction entered on March 18, 1977, in the United States District Court for the Southern District of New York, after a seven-day trial before the Honorable Constance Baker Motley, United States District Judge, and a jury.

Indictment S76 Cr. 1089, in three counts, was filed on January 27, 1977.* Count One charged Check and Philip Marasco, a/k/a "Duky", with having conspired to distribute narcotic drug controlled substances in violation of Title 21, United States Code, Sections 812, 841(a)(1), 841(b)(1)(A) and 846. Count Two charged both Check and Marasco with distributing and possessing with intent

* This indictment superseded indictment 76 Cr. 1089 which was filed December 1, 1976.

to distribute approximately .2 grams of heroin in violation of Title 21, United States Code, Sections 812, 841 (a) (1) and 841(b) (1) (A) and Title 18, United States Code, Section 2. Count Three charged Check and Marasco with the distributing and possessing with intent to distribute approximately eleven grams of heroin in violation of Title 21, United States Code, Sections 812, 841 (a) (1) and 841(b) (1) (A) and Title 18, United States Code, Section 2.

Trial commenced on February 2, 1977. On February 9, 1977 the jury convicted Check on Counts Two and Three, and on February 10, 1977 the jury convicted Check and Marasco on Count One.*

On March 18, 1977 Judge Motley sentenced Check to concurrent terms of one year's imprisonment on Counts One, Two and Three, and a three-year period of special probation to run subsequent to imprisonment.**

Check is at liberty pending appeal.

Statement of Facts

A. The Government's Case

1. Synopsis

The Government's evidence established that Check, a New York City Police Patrolman, engaged in a conspiracy to distribute narcotics and on two occasions actually negotiated and completed the sale of heroin to an undercover detective of the New York City Police Department.

* Counts Two and Three were dismissed as to Marasco at the end of the Government's case.

** Marasco was sentenced to a period of two years probation. He has not appealed his conviction.

2. Contact Made With Check

In August, 1974, Stephen Spinelli, an undercover New York City Detective using the pseudonym "Danny Genaro", was assigned to investigate an allegation that narcotics were being sold by Sandy Check, a New York City Police Patrolman. William Joseph Cali, a confidential informant, arranged to introduce Spinelli to Check for this purpose. (Tr. 63).*

On August 8, 1974, at approximately 11:00 a.m., Spinelli and Cali proceeded to Dave's Corner Restaurant, at Canal Street and Broadway in Manhattan, for a pre-arranged meeting with Sandy Check. Spinelli saw Check appear outside the front window of the restaurant and motioned for Cali to step outside, which Cali did. (Tr. 66). Cali then returned and reported back to Spinelli, who gave him instructions regarding a proposed purchase of an ounce of cocaine. Cali then left and again spoke with Check. This procedure was repeated several times, with Cali transmitting messages between Spinelli and Check. Spinelli instructed Cali during several of these conversations that under no circumstances would he "front" money to Check for the purchase of cocaine. (Tr. 70-71).**

The scene of the negotiations shifted when Spinelli left Dave's Restaurant and walked up Canal Street. He passed Check in the street and observed that Check was looking at him. (Tr. 75). Spinelli proceeded to a nearby topless bar, where Cali joined him about ten minutes

* "Tr." refers to the trial transcript; "GX" refers to Government Exhibit; "Br." refers to Check's brief; "A.A." refers to the appellant's appendix.

** The meetings between Check and Cali on the street outside Dave's Corner Restaurant were observed by Sergeant William Alley of the New York Police Department and Special Agent Richard Nally of the FBI, both of whom so testified. (Tr. 225, 235).

later. At approximately 12:45 p.m. Cali placed a telephone call, to Check and a subsequent meeting with Check was set for the following day when Spinelli was to purchase an ounce of cocaine. (Tr. 80).

3. The Second Meeting With Check

On August 9, 1974, Spinelli drove a rented car to the lower east side with Cali. Cali exited the car at East 5th Street and Third Avenue and spoke with Check and another individual. (Tr. 94). Spinelli parked the car a few blocks away, and proceeded to a coffee shop. Cali met Spinelli in the coffee shop and shortly thereafter the two proceeded to Little Peter's Bar at East 5th Street and Second Avenue to await further communication from Check. (Tr. 95). At Little Peter's Bar Spinelli and Cali were seated. Check appeared at the window outside of the bar and motioned for Cali to come outside. (Tr. 98). Cali exited Little Peters and continued his role as intermediary, shuttling messages back and forth between Spinelli inside the bar, and Check outside. During the course of these negotiations, Spinelli told Cali that he was not interested in purchasing an ounce of heroin from Check for \$2,200 but that he wanted the ounce of cocaine which had originally been promised. (Tr. 104). After several more trips by Cali out to the street, Detective Spinelli finally relented and told Cali that he would be willing to purchase a "taste" of heroin from Check for \$50. (Tr. 107).

Spinelli left the bar and retrieved \$1,500 in cash from the trunk of his parked car. (Tr. 108). Spinelli then rejoined Cali on the sidewalk in front of Sabina's candy store a few feet from Little Peter's Bar and Cali again relayed messages back and forth between Check and Spinelli. (Tr. 113). Check and Spinelli were, at certain times during the course of these negotiations, within

sight of each other, and finally Spinelli made a gesture with his hands to express disgust with the course of the narcotics negotiations. At that point Check whistled and motioned for Spinelli to come across the street and speak with him personally. (Tr. 123).

Spinelli crossed the street and was introduced by Cali to Check, who was seated on a building stoop opposite 209 East 5th Street. (Tr. 124). There, Spinelli and Check entered into direct negotiations for the sale of narcotics, discussing the price and quality of heroin and other aspects of a narcotics transaction. (Tr. 126-29). Spinelli took out the \$1,500 from his pocket and handed \$50 of that amount to Check. (Tr. 130). Check accepted the money and told Spinelli that he would get the taste of heroin later. Check instructed Cali to expect a phone call at 10:00 p.m. that evening from "Duky". Check informed Spinelli that "Duky" was his runner and could be trusted. (Tr. 131, 141). Check and Spinelli discussed further narcotics dealings, during which Check stated that he could obtain any amount of good quality cocaine for Spinelli. (Tr. 132-33).

4. Spinelli Receives Heroin On Two Occasions

On August 12, 1974, Spinelli met with Cali at the Burger Brew Restaurant on Second Avenue and 54th Street. Cali there delivered to Spinelli the taste of heroin for which Spinelli had paid \$50 to Check. (Tr. 154; GX 10).

On August 13, 1974, Spinelli met with Cali at approximately 7:15 p.m. and again proceeded to Little Peter's Bar. They passed Check and an "unknown male" on their way to the bar. (Tr. 156).

In Little Peters, Check and Spinelli engaged in further negotiations relating to the sale of narcotics, while

Cali waited for them in a different area of the bar. Check told Spinelli that Cali could not be trusted and that he had been cheated by Cali out of \$300 from a previous narcotics transaction. Check assured Spinelli that the half ounce of heroin that Spinelli was about to purchase was of good quality. (Tr. 159-60)

Spinelli counted out \$150 in cash, which was a partial payment of Cali's prior indebtedness of \$300 to Check and because Cali had arranged Spinelli's introduction to Check. (Tr. 160). Spinelli then counted out \$1,200, which was specifically for the purchase of the one-half ounce of heroin from Check. Spinelli handed to Check the total sum of \$1,350, which Check accepted, counted and put in his pocket. (Tr. 161).

Check then left Little Peters for approximately 40 minutes, returned and rejoined Spinelli. Check informed Spinelli that the heroin had been obtained, and instructed Cali to go outside and get the heroin from "Duky". (Tr. 103). Cali left the bar, and approximately ten seconds later reappeared at the window outside of the bar. Check and Spinelli then exited the bar together, parted company, and Spinelli walked over to Cali. Spinelli and Cali immediately hailed a taxi, and after entering the taxi Cali handed Spinelli the half ounce of heroin. (Tr. 165; GX 11).

5. Subsequent Activities of Check

Spinelli next met with Check in the early morning hours of August 22, 1974 at the ROK Bar on Second Avenue at 4th Street where the two had a lengthy conversation. (Tr. 174). Check told Spinelli on that occasion that he could sell much larger quantities of heroin, and he could also obtain cocaine but the cocaine might not be of a high quality. (Tr. 179). Spinelli and Check

reached an agreement for Spinelli to purchase 1/8 of a kilogram of heroin for \$5,600, and worked out a code whereby Check could leave a message on Spinelli's answering service that would describe the price and quality of heroin obtainable. (Tr. 180). Spinelli informed Check that he was still interested in purchasing cocaine rather than heroin and Check replied that although his suppliers were having a problem right now he would be getting good quality cocaine in the future. (Tr. 182). Spinelli and Check continued their conversation, during the course of which Check stated that if he had any problems with anyone, he wouldn't hesitate to shoot them. (Tr. 194). Also during the course of the conversation, Check touched Spinelli on numerous occasions on various parts of his body. (Tr. 195-96).^{*} At the close of their conversation Check told Spinelli he would call him, using a fictitious name and code in order to signal information regarding the status of the heroin transaction. Spinelli was never again contacted by Check.

6. The Ensuing Investigation

For approximately the next two years, the New York City Police Department continued its investigation into the narcotics activity of Sandy Check. Several attempts were made to gain further evidence against Check and those with whom he was dealing. The Government introduced, in this regard, a tape recorded conversation of a phone call made by Cali to Check on October 21, 1975. (Tr. 254; GX 19). During the course of that phone conversation Check made the following statement:

CALI: . . . Listen, Sandy if its possible you think we could do anything?

^{*} Spinelli testified that he was not wired during his conversation with Check because he knew Check was a policeman and thus necessarily familiar with the use of body recording devices. Spinelli feared that the discovery of such a device by Check might prompt an incident. (Tr. 191, 209).

CHECK: No.

CALI: No more?

CHECK: No more.

The Government also introduced a tape recorded conversation between Check's co-defendant, Marasco and Cali on October 23, 1975 (Tr. 349; GX 20), wherein Cali and Marasco discussed further narcotics transaction. Sandy Check's name appears prominently in the conversation. The Government introduced a short tape recorded conversation between Spinelli and Check which occurred on August 5, 1976 (Tr. 204-07; GX 16) only a few blocks from the New York City Police Academy. This conversation contained repeated references by Spinelli to his prior narcotics transactions with Check and proposals for new transactions.

Sergeant John Comiskey, of the Internal Affairs Division of the New York City Police Department, testified for the Government that on the basis of a complete search of the Intelligence files of the Police Department, Patrolman Sandy Check never filed any intelligence report regarding any persons with the names Philip Marasco, a/k/a "Duky", Danny Gennaro, William Joseph Cali or for any of the locations surrounding Dave's Corner Restaurant, Little Peter's Bar, the ROK bar, or the vicinity of the police academy. (Tr. 362-63). Sergeant Comiskey testified that all New York City police personnel are required to submit such intelligence reports when they observe criminal activity taking place. (Tr. 365).

As the last part of its case, the Government introduced the grand jury testimony of Philip Marasco on October 5, 1976 (Tr. 532-41; GX 22), wherein Marasco first admitted and then denied that he had had discussions relating to narcotics (Tr. 535) with his friend Sandy Check. Marasco also denied ever having had discussions related to narcotics with William Joseph Cali. (Tr. 538).

The Government's final piece of evidence was a slip of paper seized from Marasco after he was arrested on November 30, 1976. (Tr. 543). On the slip of paper were Sandy Check's address and telephone number.

At the close of the Government's case, Judge Motley, with the consent of the Government, granted Marasco's motion for judgments of acquittal as to Counts Two and Three.

B. The Defense Case

Check testified in his own defense. Although he acknowledged meeting Cali at Dave's Corner Restaurant on August 8, 1974 (Tr. 640) and Spinelli at the ROK bar on August 22, 1974 (Tr. 645), he denied ever selling drugs or meeting Spinelli on August 9, 1974, or receiving \$50 from him at that time. (Tr. 640). Check further denied receiving \$1,350 from Spinelli on August 13, 1974, at Little Peter's. (Tr. 642).

Check testified that he knew Cali for a number of years (Tr. 636); that Cali was an unreliable person, a narcotics user and a young derelict who was under psychiatric care. (Tr. 637). Check stated that Cali had approached him with respect to narcotics as early as 1973 and that although Check wanted nothing to do with him he went to Dave's Corner Restaurant on August 8, 1974, to see if Cali could get him a good drug arrest.* (Tr. 638). Check further stated that he thought

* During the entire trial, William Joseph Cali was waiting outside the courtroom, and it was obvious at the outset that the Government wished to call Cali as a witness. This intention was manifested by its request for a charge as to the testimony of Cali (Government request to Charge No. 16); by its request for a voir dire question to the jury concerning testimony by a confidential informant (Tr. 14); and its request for a material witness

[Footnote continued on following page]

Detective Spinelli, who wanted to buy large amounts of drugs from him at the ROK bar, was a "crackpot" (Tr. 645) and therefore he neglected to file an intelligence report on this incident.

Check was found guilty on all three counts of superseding Indictment S76 Cr. 1089 by the jury. The District Court first charged the jury on Counts Two and Three, the substantive sales of heroin to Spinelli and after verdict on those counts charged the jury on the conspiracy count.

ARGUMENT

POINT I

Spinelli's Testimony About His Own Statements Was Not Hearsay and Was Properly Admitted.

Check argues that the District Court erred in permitting Detective Spinelli to testify to what *he* (Spinelli) said to Cali during numerous conversations that preceded the sale of heroin. These conversations occurred when Spinelli was in Dave's Corner Restaurant and Little

warrant for Cali when he failed to comply with a subpoena for his presence at trial. (Tr. 12, 279-80). Early in the trial, the Government told the Court and defense counsel that it had not determined that Cali would be called as a witness, but that he was available for the defense to call. (Tr. 43). Further the Court made Cali available for the defense to speak with, and counsel took advantage of this opportunity by speaking with Cali and recording their conversation with him. (Tr. 279). Through his attorney Cali made it clear that he would not testify as a witness in this trial either for the Government or the defense (Tr. 270, 376) and would be held in contempt if necessary. Accordingly all parties agreed to stipulate that he was an unavailable witness. (Tr. 695).

Peter's Bar, Check was waiting on the street, and Cali was ferrying message between the two. Check lists in his Brief, pp. 15-17, eight portions of Spinelli's testimony that he now claims was hearsay. In particular, he claims that Spinelli's statements to Cali really reflected what Cali said to Spinelli, and thus constituted "back door" admission of Cali's out-of-court statements. This argument is meritless, for several reasons.

A. Check did not properly preserve the issue

In his brief, Check claims that the disputed testimony was admitted "over the vigorous and continued objections of defense counsel" (Br. at 14). A review of that record, however, reveals not only that the claim now raised on appeal was not properly raised in the District Court, but that a proper objection would have been sympathetically received by Judge Motley.

With respect to the eight portions of testimony cited by Check, absolutely no objection was made as to six. (Tr. 67-68, 68-69, 70, 76, 80, 104). Indeed, the first of these portions to which any objection was raised was the sixth (Tr. 85),* and on this occasion the objection raised by counsel for Check was not that the testimony was hearsay, but that it was "self-serving."** The only

* This objection was clearly untimely as to those portions of the testimony already admitted into evidence. 1 Wigmore, Evidence, § 18 at 323 (3d ed. 1940); Weinstein, Evidence, ¶ 103 [2] at 103-16 (1976)

** As Judge Motley noted, when the same objection was made later, "I don't know what you mean by 'self-serving.' There is no such objection as 'self-serving.'" (Tr. 92). Later in the same colloquy, Check's attorney did articulate the objection he makes now. (Tr. 93). At no time during that colloquy or others concerning evidence about which he now objects did he ask that testimony be stricken, although when he did make this request it was granted in other instances.

portion of the testimony contained in Check's list to which a proper objection was made was the last, which, on the basis of Check's argument, the District Court overruled.*

The law is clear that a claim of error may not be based upon the admission of testimony unless a clear contemporaneous objection was made "stating the specific ground of the objection." F.R. Evid. 103(a)(1). This Court's decision in *United States v. Bennett*, 409 F.2d 888 (2d Cir.), *cert. denied, sub. nom., Jessup v. United States*, 396 U.S. 852 (1969) (Friendly, J.), is instructive. In that case evidence claimed to be in violation of the hearsay rule was admitted into evidence. Although the Court on appeal noted that the testimony was probably inadmissible, *id.* at 898, it observed:

"The original objection was without basis, and 'a specific objection *overruled* will be effective to the extent of the grounds specified, and no further.' 1 Wigmore, Evidence § 18 at 339 (3d ed. 1940). While the later objection at side-bar came close to presenting the real point, the judge was warranted in believing that counsel was satisfied with the limiting instruction he proposed; if counsel objected to that or to the short-fall of the instruction as given, he should have said so." *Id.*

* Judge Motley's response to this objection underscores her concern for making a prompt response to questions clearly raised before her. After Check had made his objection, Judge Motley questioned the witness to ascertain the precise import of his testimony, and specifically admonished him not to include in his testimony the content of his conversations with Cali. (Tr. 119-20). It should be noted that even though Judge Motley had shown her willingness to strike testimony when a proper objection was made (Tr. 79, 103) and had, at the request of counsel, previously made a curative instruction to the jury (Tr. 103), counsel did not ask to have this portion of the testimony stricken, even in the face of an obvious expression of concern on the part of the Court.

See also *United States v. Indiviglio*, 352 F.2d 276, 279 (2d Cir. 1965) (en banc), *cert. denied*, 383 U.S. 907 (1966); *United States v. Del Llano*, 354 F.2d 844, 847-48 (2d Cir. 1965) (en banc). The circumstances of this case made the need for common sense adherence to this rule obvious. Judge Motley repeatedly asked counsel to make specific objections.* Furthermore, on those two occasions when counsel for Check specifically moved to strike testimony, Judge Motley ordered the testimony stricken. (Tr. 79, 103). Thus, it is clear that the lack of an objection was not excusable on the ground that one would have been futile,** and this failure alone deprives his claim on appeal of any validity.

B. Spinelli's testimony was admissible.

Even if Check had made a timely and complete objection, Spinelli's testimony was nonetheless admissible. First, of course, Spinelli's testimony of what he said to another person is simply not hearsay. Not only was Spinelli a witness who testified at trial and was subject to cross-examination, but his testimony was not admitted "to prove the truth of the matter asserted." F.R. Evid. 801(c). Rather, his testimony concerning what he told Cali was admitted solely "to aid the jury in understanding the

*See, e.g., Tr. 105: "What specifically do you have in mind so that I can rule on it?" See also Tr. 82, 92.

** In *Estelle v. Williams*, 425 U.S. 501 (1976), the Supreme Court held that trying a defendant in prison garb deprived him of due process. It also held, however, that a lack of specific objection to the procedure precluded review, even though the defendant had on two occasions vented, in a general way, his objection to the arrangement. *Id.* at 510. The Court particularly noted that if an objection had been made at the time, the problem would have been cured. *Id.* at 510-11. It must surely follow that if an incomplete objection does not preserve an issue of fundamental constitutional magnitude, *a fortiori* it does not preserve the issue of what is at best a marginal issue under the Federal Rules of Evidence.

background events leading up to the crimes in question." *United States v. Lubrano*, 529 F.2d 633, 637 (2d Cir. 1975), *cert. denied*, 429 U.S. 818 (1976).^{*} Indeed, this Court has upheld the admissibility of such statements in factual circumstances nearly identical to those of this case. *United States v. Lubrano*, *supra*; *United States v. Ruggiero*, 472 F.2d 599, 607 (2d Cir.), *cert. denied*, 412 U.S. 939 (1973); *United States v. Manfredonia*, 414 F.2d 760, 765 (2d Cir. 1969).^{**}

Check's claim that Spinelli's testimony merely provided a "back door" avenue for introducing Cali's version of the facts without subjecting him to cross-examination ignores both the facts and the law. First, the Government did not, as Check would have this Court believe, deliberately keep Cali from appearing before the jury. As the record makes plain, the Government hoped to call Cali as a witness, but became concerned when he failed to appear at the commencement of the trial in response to a subpoena.^{***} (Tr. 12, 279-80). This concern quickly

^{*} *Lubrano* also disposes of any objection Check might raise concerning the absence of a limiting instruction. This Court noted, "Although they were inadmissible as proof of the matters asserted, if a limiting instruction had been requested, it might well have been given." *Id.* at 637.

^{**} In addition, as this Court noted in *United States v. Ruggiero*, *supra*, 472 F.2d at 607, the statements constituted non-hearsay "verbal acts," that is, they were "contemporaneous utterances explaining non-verbal conduct or its tenor." *United States v. D'Amato*, 493 F.2d 359, 363 (2d Cir.), *cert. denied*, 419 U.S. 826 (1974); see also *id.* at 364; *United States v. Wiley*, 519 F.2d 1348, 1350 (2d Cir. 1975), *cert. denied sub nom.*, *James v. United States*, 423 U.S. 1058 (1976); *United States v. Glasser*, 443 F.2d 994, 999 (2d Cir.), *cert. denied*, 404 U.S. 854 (1971), and cases there cited.

^{***} Indeed, while Check now attempts to insinuate to this Court that the Government never intended to call Cali, his belief at trial was otherwise, as the cautious prosecutor pointed out to him. During Check's opening, his attorney began to describe to the jury Cali's qualities as a witness. There followed this colloquy:

[Footnote continued on following page]

proved itself to be justified when Cali announced, through his lawyer, that he would not testify, even if granted immunity. (Tr. 270, 375-76). Thus, the non-production of Cali was clearly not deliberate,* nor was it ever used as a basis for admitting evidence that would not have been admitted had his unavailability been known from the start.** In addition, any possible "spillover" that might have occurred was eliminated both by the prosecutor, who was at all times careful to limit his questions of Spinelli to *his* own statements (Tr. 76, 77, 78, 95, 104) and on several occasions rephrased questions to emphasize that Cali's statements were not sought, (Tr. 79, 95)*** and by the defense, who were vociferous in their attacks on Cali and their objections to his absence as a witness. (Tr. 79, 105, 151, 152). In short, the Government did

Mr. Sudler: Objection, your Honor, at this time, because of what transpired this morning, I don't believe that counsel can make a statement as to Mr. Cali.

The Court: He is assuming that you are going to call him as a witness, I guess. He doesn't know who you are going to call.

Mr. Sudler: I wish he wouldn't make that assumption. Thus, defense counsel was aware of the precise situation with regard to Cali.

* In addition, the absence of Cali hardly hampered Check in his unstinting efforts at attacking Cali's credibility and character. These attempts constituted a portion of Check's own testimony (Tr. 635-37, 647) and his counsel's summation. (Tr. 845, 848, 853, 860-62).

** Judge Motley made it clear on two occasions in ruling on objections that she was not assuming that Cali would testify. (Tr. 103, 119). Thus, it is not the position of the Government that a statement otherwise hearsay becomes non-hearsay merely because the declarant may be called as a witness. See *United States v. Floyd*, Dkt. No. 76-1462, slip op. 3495, 3502 (2d Cir., May 16, 1977).

*** In addition, the prosecutor never referred, either directly or indirectly, to any inference of Cali's version of the events in his summation. Cf. *United States v. Rosenwasser*, 550 F.2d 806, 308-09 (2d Cir. 1977); *United States v. Gonzalez*, Dkt. No. 76-1523, slip op. 3351, 3367 (2d Cir., May 6, 1977).

not reap any improper benefit, either intentionally or otherwise, from the testimony.*

POINT II

The Evidence Supporting Check's Conviction on the Conspiracy Count Was More Than Sufficient.

Check argues that there was insufficient evidence to support the conspiracy count in the indictment. His legal argument is frivolous in the extreme, and also ignores the controlling facts.

First, Check's legal theory wilts under scrutiny. It should be emphasized that Check does *not* even argue that there was insufficient evidence admitted against him

* Indeed, even if the Court were to find both that Check properly preserved the issue and that legal error occurred, the error was clearly harmless. This was made most clear by this Court's recent decision in *United States v. Floyd*, Dkt. No. 76-1462, slip op. 3495, 3502-03 (2d Cir., May 16, 1977). There, a statement directly implicating the defendant was found by this Court to be hearsay. Even though, as the concurring judge noted, slip op. at 3506, the erroneously admitted statement provided the only positive evidence that the defendant committed the crime charged, the Court held that its admission was harmless error. *A fortiori*, that is surely true in this case. Here the identity of Check was conceded; the events surrounding the communications provided a strong circumstantial demonstration of the content of Cali's statements, cf. *United States v. Medico*, Dkt. No. 76-1426, slip op. 3795, 3806-07 (2d Cir., May 25, 1977); *United States v. Lubrano*, *supra*, and the statement did not bolster Spinelli's credibility (the focal point of the defendant's attack on summation, see Tr. 845, 848, 853, 860-62), but rather depended upon it. In addition, of course, Check's own subsequent conversations with Spinelli specifically referred to his prior contact through Cali, and made it explicitly clear that the communications involving Cali were not innocent, but involved heroin. See also *United States v. Cheung Kin Ping*, Dkt. No. 76-1362, slip op. 2063, 2076 (2d Cir. Feb. 28, 1977) (admissibility of possibly improper confession harmless error).

to support the Grand Jury's allegation that he conspired with his co-defendant Marasco to violate the federal narcotic laws. Indeed, Check's own statements to Spinelli, admissible against him as an admission under F. R. Evid. 801(d)(2)(A), conclusively established that Check and Marasco had acted together in distributing narcotics. Rather, Check's argument seems to be that unless these same statements were also admissible against Marasco as well, under the co-conspirator exception to the hearsay rule, F. R. Evid. 801(d)(2)(E), there was insufficient evidence to support Marasco's conviction, and thus Check could not be convicted of conspiring with him. This Tinkers-to-Evers-to-Chance reasoning is simply bereft of support in the case law or in common sense. Dicta in some Second Circuit decisions indicate that where two defendants are alleged to have conspired with each other and with no one else, an appellate finding of insufficient evidence to support the conviction of one conspirator will necessarily apply to the second conspirator as well. *United States v. Postma*, 242 F.2d 488, 492 (2d Cir. 1957); *United States v. Masiello*, 235 F.2d 279, 280 (2d Cir.), cert. denied sub nom., *Stickel v. United States*, 352 U.S. 882 (1956). However, in each of these cases, the evidence at trial was equally admissible against each defendant; as a matter of common sense, if the evidence supporting the demonstration of the conspiratorial agreement was insufficient, both defendants necessarily could not have been a member of the conspiracy. Here, however, significant portions of the evidence were clearly admissible against Check but were admissible against Marasco only if the Government first met its burden under *United States v. Geaney*, 417 F.2d 1116, 1120 (2d Cir. 1969), cert. denied sub nom., *Lynch v. United States*, 397 U.S. 1028 (1970). It surely follows that even if Check's statements were inadmissible against Marasco, Check could nonetheless be convicted of conspiracy. Any other conclusion would fly in the face of the legal verity that the guilt of a given defendant is to be judged solely on the basis of the evidence against him, and not on the basis of the evidence against another person.

Second, even if one were to assume, *arguendo*, the validity of Check's novel proposition, the facts nonetheless do not support it, since the admissibility of Check's statements against Marasco was clear, as the District Court found. As this Court has recently had occasion to reiterate, once a criminal venture is demonstrated, only a "likelihood of illicit association" on the part of a given defendant is necessary for him to become bound by the statements of his co-conspirators. *United States v. Mejias*, 552 F.2d 435, 445 (2d Cir. 1977); *United States v. Calabro*, 449 F.2d 885, 891 (2d Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972). That lenient test was surely met here. Marasco's grand jury testimony alone demonstrated that he not only knew the precise locales where the narcotics transactions took place, but had spoken with Check about narcotics.* When one adds to this the piece of paper taken from Marasco at the time of his arrest (GX 23) showing Check's address and telephone number, and the content of Cali's recorded conversation with Marasco on October 23, 1975 (GX 20), which is replete not only with references to Check but to street names for narcotics such as "coke," "junk," and "H," the "likelihood of illicit association" was overwhelming.** See e.g., *United States v. Ruiz*, 477 F.2d 918, 919-20 (2d Cir.), *cert. denied*, 414 U.S. 1004 (1973); *United States v. D'Amato*, 493 F.2d 359, 363-64 (2d Cir.), *cert. denied*, 419 U.S. 826 (1974). Indeed, in *Ruiz*, the sole non-hearsay evidence connecting the defendant with the conspiracy was that his co-defendant's telephone number was found on him at the time of his arrest, and he was seen to nod at the defendant. See also *United States v. Stanchich*, 550 F.2d 1294, 1300 (2d Cir.

* The fact that Marasco later in the grand jury appearance contradicted himself and stated that he had not spoken with Check about narcotics further showed his consciousness of guilt.

** Before the Grand Jury, Marasco denied having had such a conversation with Cali, thus also demonstrating his consciousness of guilt.

1977)).* Here, such acts formed only a portion of the showing that Marasco participated in the conspiracy.

Finally, Check ignores the fact that, unlike the defendants in *United States v. Postma, supra*, and *United States v. Masiello, supra*, he was indicted for conspiring with Marasco and "others to the Grand Jury unknown." Whatever the jury might have concluded about the participation of Marasco had Check's statements not been considered against him, the evidence surely sufficed to demonstrate Check's conviction of conspiring with *someone* in distributing narcotics. Both from the context of his negotiations with Spinelli and from specific references in his remarks, it was clear that he was not operating alone but rather with another person who effected the delivery of narcotics for him. From this alone the jury was entitled to convict Check on the conspiracy count, quite aside from the demonstrable participation of Marasco.**

* The Court in *Stanchich* also noted, in language appropriate to this case:

"It is true that every one of Stanchich's acts is susceptible of an explanation other than participation in the conspiracy. However, as we said in *Geaney*, 417 F.2d at 1121, 'pieces of evidence must be viewed not in isolation but in conjunction.' . . . Judges are not required to exhibit a naiveté from which ordinary citizens are free." *Id.* at 1300.

** As the Supreme Court has noted, one can be convicted of conspiring with others who remain "unknown" even to the jury throughout the trial. *Rogers v. United States*, 340 U.S. 367, 375 (1951). This Court has noted that the mere involvement of a person whose identity remains totally unclear will suffice to convict the defendant of conspiring with him. *United States v. Bommarito*, 524 F.2d 140, 144 (2d Cir. 1975).

POINT III

The District Court Properly Admitted Death Threat Statements Made By Check To Detective Spinelli During The Course Of Their Narcotics Negotiations.

Check contends that his conviction should be reversed because Detective Spinelli testified that Check stated he would not hesitate to shoot anyone if he had any problems. (Tr. 194). This contention is utterly without merit.

During his direct examination, Spinelli recounted a lengthy conversation with Check that took place in the ROK bar during the early morning hours of August 22, 1974. (Tr. 174-203). In the course of that conversation, Spinelli negotiated with Check for the sale of 1/8 kilogram of heroin for \$5,600. Spinelli testified that Check stated to him he would shoot anyone "if he had any problems." This statement by Check, during the course of a narcotics negotiation, was an admission by a defendant within the meaning of F.R. Evid. 801(d)(2)(A). Check's statement was thus admissible, and clearly relevant to show his intent and consciousness of guilt.*

Check argues from a line of cases which are completely inapposite on this point. The decisions upon which he relies hold that "[o]rdinarily, *unrelated* death-threat testimony is kept from the jury because its potential for causing unfair prejudice outweighs its probative value with respect to a defendant's guilt." (Emphasis added) *United States v. Panebianco*, 543 F.2d 447, 455

* Check later claimed that while he engaged in conversation with Spinelli, he thought Spinelli was a "crackpot." (Tr. 645). His conversation with Spinelli was thus fully relevant to show that, in fact, he acted with criminal intent.

(2d Cir. 1976). (Br. 30). *Panebianco*, and other cases cited by Check, *United States v. Malizia*, 503 F.2d 578 (2d Cir. 1974), *cert. denied*, 420 U.S. 912 (1975); *United States v. Cirillo*, 468 F.2d 1233 (2d Cir. 1972), *cert. denied*, 410 U.S. 989 (1973), presented a different factual situation from this case. In each of the cited cases, evidence of a death threat emanating from someone *other than the defendant* was admitted solely for the purpose of explaining a witness's actions.* In each instance, this Court found the testimony admissible even though there was absolutely no connection of the threat with the defendant, and thus the jury might impermissibly and incorrectly assume that the defendant was responsible for the threats. In this case, the intemperate language was that of the defendant himself, uttered during the course and as part of his conspiratorial discussions with Spinelli. The proposition that the Court should have redacted Check's own statements to give an erroneous impression to the jury of what he actually said not only is totally without support in precedent but belies

* Those decisions provide an independent ground for the admissibility of Spinelli's evidence. The principal focus of Check's defense, both during opening (Tr. 55) and summation (Tr. 849, 851, 859, 862, 869) was on Spinelli's credibility. In particular, Check argued that since Spinelli did not wear a recording device, even though it had been elicited on cross-examination that he was familiar with their use (Tr. 170-71), his testimony concerning the unrecorded conversations could not be believed. It was thus perfectly proper to show that Spinelli was dealing with a man who was suspicious of him and would have caused harm had he happened to discover the device.

common sense.* In short, the district judge acted well within her discretion in admitting the testimony.**

* At any rate, the admission of this testimony could only have been the most harmless of errors. It consumed a very small portion of the unusually lengthy direct examination of Spinelli, and was not the subject of either cross-examination or summations by either side. Particularly since the remarks did not add to the credibility of the Government's principal witness but rather depended upon it, it simply could not have harmed Check. By way of comparison, this Court on two occasions has affirmed convictions in which statements connecting the defendant with "the Mafia" have been admitted. *United States v. Morgan*, Dkt. No. 76-1497, slip op. 2997, 2999 (2d Cir., April 18, 1977); *United States v. Schwartz*, 548 F.2d 427, 431 (2d Cir. 1977).

** As this Court has emphasized with respect to precisely this sort of testimony, admission of the evidence is primarily left to the District Court, which alone is able to gauge its effect upon the jury in the context of the case as a whole. *United States v. Cheung King Ping*, Dkt. No. 76-1362, slip op. 2063, 2071 (2d Cir., Feb. 28, 1977); see also *United States v. Panebianco*, 543 F.2d 447, 454 (2d Cir. 1976), *cert. denied*, — U.S. — (1977). See generally, *United States v. Rosenwasser*, 550 F.2d 806, (2d Cir. 1977); *United States v. Corr*, 543 F.2d 1042, 1051 (2d Cir. 1976), and cases there cited.

While Check claims that this case is somehow different, since no limiting instruction was given, he does not note that he never requested such an instruction, thus precluding it from review on that ground. See *United States v. Bermudez*, 526 F.2d 89, 97 (2d Cir. 1975), *cert. denied*, 425 U.S. 970 (1976); *United States v. Lubrano*, *supra*, 529 F.2d at 637.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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AFFIDAVIT OF MAILING

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COUNTY OF NEW YORK)

ss.:

DAVID NEWMAN, being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 8th day of July, 1977
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And deponent further says that he sealed the said envelope and placed the same in the mail drop for mailing at the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

David Newman
DAVID NEWMAN

Sworn to before me this

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